U.S. DEPARTMENT OF JUSTICE

Antitrust Division

STATEMENT

of

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before the

Subcommittee on Antitrust, Business Rights, and Competition
Committee on the Judiciary
United States Senate

concerning
International Antitrust Enforcement

Washington, D.C.
October 2, 1998

Good morning, Mr. Chairman and members of the Subcommittee. It is a pleasure for me to appear before you today on behalf of the Antitrust Division of the Department of Justice to discuss the challenges for antitrust enforcement in the global economy, and what we are doing to meet those challenges.

As trade and commerce become increasingly global in scale, vigorous international antitrust enforcement is key to helping ensure that American businesses have the opportunity and the incentives to compete successfully. Effective international antitrust enforcement requires not only that our own enforcers remain vigilant and active, but also that we are able to obtain assistance, where needed, from foreign antitrust enforcement authorities.

In the last few years, we have worked to strengthen the international enforcement tools at our disposal. With the help of this Subcommittee, we were able to obtain passage of the International Antitrust Enforcement Assistance Act of 1994, which enables us to enter into agreements with our foreign counterparts to share information and provide assistance on a reciprocal basis. In the spring of 1997, we obtained a critically important ruling from the First Circuit in United States v. Nippon Paper Industries Co. Ltd., reaffirming that Congress indeed gave us jurisdiction to prosecute anticompetitive activities that take place off U.S. soil but that have significant effects here; in January, the Supreme Court denied certiorari in that case. These two developments are important building blocks for our continuing efforts to build an effective international antitrust enforcement regime and make effective use of it.

We have achieved some remarkable successes recently, including unprecedented levels of criminal fines and, just two weeks ago, guilty verdicts in what may be the most significant criminal trial in antitrust history, the Archer Daniels Midland trial.

From a practical standpoint, the increasing globalization of markets leads to increased complexity in our investigations, making it more difficult, time-consuming, and costly to pursue an investigation to its ultimate conclusion. Often, we must have the assistance of authorities in other countries in order to obtain crucial evidence. It is therefore particularly important, as Congress recognized in passing the 1994 Act, that we be able to cultivate and maintain constructive working relationships with our foreign counterparts.

Although the United States can rightly claim a large share of the credit for the adoption around the world of competition as the foundation for commercial relationships, each country's competition law is tailored to its own legal system and culture. That variation in approaches to antitrust enforcement, in a world where countries zealously protect their sovereignty, creates a number of difficult challenges in building an international antitrust enforcement regime that works effectively, challenges which have been brought to the forefront with the increasing globalization of markets.

As many of you may know, late last year the Attorney General and I established an International Competition Policy Advisory Committee to look at these challenges with a fresh perspective, giving particular attention to three key issues. First, how can we build and strengthen a consensus among competition enforcement authorities around the world for prosecuting international cartels? Second, at a time when increasing numbers of mergers involve international transactions that directly affect competition in more than one country, how can the various competition enforcement authorities best coordinate their merger review efforts, while preserving their sovereignty, to achieve results that are sound and efficient, both for the parties to these mergers and for consumers in the countries affected by them? And third, how can we

ensure that, as our international trade agreements remove governmental impediments to free trade, those impediments are not replaced by anticompetitive schemes on the part of private firms to impede market access? Getting the right answers to these questions is essential to the maintenance of free and fair international commerce, and its attendant benefits for the U.S. economy.

We were able to recruit a highly esteemed membership representing broad experience and expertise from U.S. business, industrial relations, academic, economic and legal communities, led by the co-chairs, former Assistant Attorney General for Antitrust Jim Rill and former International Trade Commission Chairwoman Paula Stern.

After an initial meeting in February, the Advisory Committee members have been meeting in working groups to focus on specific issues. On September 11, the Advisory Committee met to begin sorting through various options compiled for addressing these matters. The Advisory Committee is planning to hold three days of hearings November 2-4; the first day will feature antitrust enforcement officials from around the world. At this point, the Advisory Committee is still in the midst of its information gathering stage. We expect the Advisory Committee to hold several more meetings in the months ahead, and give us its final report next fall. I believe its report will be of tremendous value to the Department of Justice and to this Subcommittee as we continue our efforts to internationalize basic antitrust principles and make them the foundation for the burgeoning commercial relationships among nations. We will keep the Subcommittee apprised of the Advisory Committee's work as it progresses.

Of course, none of the challenges the Advisory Committee is examining is going to take a holiday while we wait for the Advisory Committee's report. So we are continuing to pursue

our enforcement responsibilities vigorously in the international arena. Let me now say a few words about the three major facets of our international enforcement agenda: international cartel enforcement, international merger enforcement, and positive comity.

International Cartel Enforcement

Vigorous enforcement against international cartels is a top priority for us. As a result of our aggressive overall criminal enforcement efforts against hard-core antitrust violations such as price-fixing and market allocation, we have set records in the last two fiscal years in the level of fines collected. In fiscal year 1997, criminal fines totaling $205 million dollars were secured in cases brought by the Antitrust Division. This total is five times higher than during any previous year in the Division's history. We broke that record in the fiscal year just ended, with more than $267 million in fines imposed or recommended in plea agreements. Of the roughly $472 million in fines secured in the last two years, nearly $440 million -- well over 90 percent -- were in connection with the prosecution of international cartel activity, a graphic illustration of the increasingly international focus of our criminal enforcement work, and our success in cracking international cartels.

This focus is well justified. International cartels typically pose an even greater threat to American businesses and consumers than do domestic conspiracies, because they tend to be highly sophisticated and extremely broad in their impact -- both in terms of geographic scope and in the amount of commerce affected by the conspiracy. The massive international cartels uncovered in citric acid, lysine (another food and feed additive), sodium gluconate (an industrial cleaner), and graphite electrodes (used in steel making) are prime examples. The criminal purpose behind these and other conspiracies investigated and prosecuted by the Division has

been to carve up the world market by allocating sales volumes among the conspirators and agreeing on what prices would be charged to customers around the world, including customers in the United States.

International cartels victimize a broad spectrum of U.S. commerce, costing American businesses and consumers hundreds of millions of dollars a year. For example, citric acid, which is used in products ranging from soft drinks and processed food to detergents, pharmaceuticals, and cosmetics, is found in virtually every home in the United States. Sales in the United States during the course of the citric acid conspiracy were over $1 billion. In the lysine conspiracy, prices went up approximately 70 percent in less than three months during the first year of the conspiracy; in another conspiracy currently under investigation, prices increased over 60 percent during the course of the conspiracy. In another conspiracy we uncovered, oil and gas companies were forced to pay higher prices to conspirators in a marine construction cartel. In another, the United States Navy was found to have paid inflated prices to conspirators in a marine transportation cartel. And in yet another, steel makers were forced to endure steep price hikes, far exceeding the rate of inflation, orchestrated by manufacturers of the graphite electrodes needed to run mini mills. In each of these cases, American consumers -- and, in cases where the U.S. government is the victim, American taxpayers -- ultimately foot the bill.

The international cartels uncovered by the Division have often been governed by elaborate agreements among the conspirators to ensure that each conspirator understood its role in suppressing competition and increasing prices in the varied markets of the world where the goods and services were sold. The cartel agreements, which were formed by high-level executives and carried out through conspiratorial meetings around the globe, included the

following features: agreed-upon prices; agreed-upon volumes of sales worldwide; agreed-upon prices and volumes (market share allocation) on a country-by-country basis; exchanges among the conspirators of all types of otherwise competitively sensitive information, such as monthly sales figures by geographic area, prices charged (or bid) to customers in particular geographic areas, and prices to be charged (or bid) to specific customers; and sophisticated mechanisms to monitor and police the agreements.

Let me give you two specific examples of ways in which these cartels eliminated any incentive on the part of the conspirators to "cheat" on the agreement by actually engaging in competition. In the citric acid cartel, the conspirators devised a compensation system whereby the cartel members reviewed the sales of each conspirator at the end of each year, and any company that had sold more than its precisely allotted share in one year was required in the following year to make amends to the cartel by purchasing the amount it was in excess from another conspirator that had not reached its volume allocation target in that proceeding year. In the marine transportation cartel, the conspirators, in addition to agreeing on which customers each would service, also agreed to pool their revenues from all jobs and then divide them up according to a complex formula.

Thus far, while much remains to be done, we have had great success in prosecuting these international cartels. In the food and feed additives industry alone, our efforts have resulted in criminal convictions or plea agreements against 9 companies and 10 individuals from 6 countries, and nearly $200 million in fines imposed or agreed to in the past 2 years -- including a $100 million fine imposed on Archer Daniels Midland Company and a $50 million fine imposed on Haarmann & Reimer Corporation, the U.S. subsidiary of the German-based pharmaceutical

giant Bayer AG. And investigations in the marine construction and transportation industries have resulted in the conviction of three companies, from the Netherlands, Belgium, and the United States, as well as three foreign executives from those firms. The firms agreed to plead guilty and to pay a total of $65 million in criminal fines.

In February, we charged Showa Denko Carbon, a U.S. subsidiary of a Japanese firm, with participating in an international cartel to fix the price and allocate market shares worldwide for graphite electrodes used in electric arc furnaces to melt scrap steel. The company agreed to plead guilty, cooperate in the Division's ongoing investigation, and pay a fine of $29 million. In April, another participant in that cartel, UCAR International, agreed to plead guilty and pay a fine of $110 million, the largest fine imposed in antitrust history. Sales of graphite electrodes in the United States during the term of the conspiracy were well over a billion dollars. This investigation is continuing.

Two weeks ago, we achieved a tremendously important victory in our battle against international cartels, when the jury returned a verdict of guilty against three top executives of Archer Daniels Midland, for masterminding their company's participation in the lysine cartel. This will send a strong deterrent message around the world that our commitment to vigorous enforcement against hard-core cartels includes prosecuting the top corporate brass in appropriate cases.

The Division's case statistics demonstrate our current emphasis on international enforcement. When you compare the number of cases involving foreign-based defendants since the beginning of FY 1997 with figures from the five-year period from FY 1987-1991, the contrast is staggering. In FY 1991, only 1% of the corporate defendants in our criminal cases were

foreign-based. And in the four previous years, from FY 1987-1990, the Division did not bring a single case against a foreign-based corporation. In stark contrast, in FY 1997, 32 percent of the corporate defendants in our criminal cases were foreign-based; in the fiscal year just ended, 50 percent of them were foreign-based.

Notwithstanding our recent success, I am convinced that these prosecutions represent just the tip of the iceberg. At present, more than 30 U.S. antitrust grand juries -- approximately one-third of the Division's criminal investigations -- are looking into suspected international cartel activity. The subjects and targets of these investigations are located on five continents and in over 20 different countries. In more than half of the investigations, the volume of commerce affected over the course of the suspected conspiracy is well above $100 million; in some of them, the volume of commerce affected is over $1 billion per year.

The Division believes that in order to ensure that our antitrust laws are an effective deterrent against even the largest and most far-reaching international cartels, it is crucial that correspondingly large fines be imposed on cartel conspirators who are caught and prosecuted. This is particularly true in light of the fact that the foreign individuals behind the international cartels are too often beyond the easy reach of our legal process and thus not subject to the other major deterrent, prison.

Unfortunately, the approach set forth in the Sentencing Guidelines for calculating antitrust fines according to the scope of the violation is often thwarted by the $10 million statutory ceiling in the Sherman Act, forcing us to rely on the far more unwieldy "twice the gain or twice the loss" alternative sentencing provision in 18 U.S.C. § 3571(d). The fact that we have been able to use the alternative provision in settlement negotiations on several occasions should

not obscure the fact that having to rely on it is potentially a severe hindrance to effective criminal enforcement. That is why we have asked Congress to raise the Sherman Act ceiling to $100 million, more in keeping with the scope of cartel activity we are finding in the international marketplace. We must ensure that the old adage "crime does not pay" continues to be a meaningful deterrent for even the largest offenders.

The investigation and prosecution of international cartels creates a number of imposing challenges for the Division. In many cases, key documents and witnesses are located abroad -- out of the reach of U.S. subpoena power and search and seizure authority. In such cases, national boundaries may present the biggest hurdle to a successful prosecution of the cartel. For that reason, we are aggressively pursuing cooperation agreements with foreign competition authorities to step up cooperation aimed at hardcore cartels.

To that end, we have been working in the Organization for Economic Cooperation and Development (OECD) to encourage OECD members toward more systematic and effective anti-cartel enforcement and international cooperation. We introduced such a proposal two years ago; it was promulgated in March of this year as a recommendation by the OECD Council, and endorsed in May at the ministerial level -- very quick action by OECD standards. The recommendation encourages member countries to enter into mutual assistance agreements to permit sharing evidence with foreign antitrust authorities, to the extent permitted by national laws, and to take another look at provisions in their laws that stand in the way of these cooperative efforts.

International Merger Enforcement

As trade and commerce have become increasingly globalized, inevitably there have been increasing numbers of mergers that cross international boundaries and thus are subject to review by more than one country's antitrust authority. To minimize the burden placed on merging parties by multi-jurisdictional antitrust review, and to minimize the conflicts that can result from differing conclusions regarding a merger, it is important that we establish and cultivate good relations with foreign enforcers and understand each other's merger enforcement policies and practices, and coordinate where we can. Given each jurisdiction's understandable interest in reviewing mergers that impact its markets, and in applying the substantive and procedural rules it deems appropriate, navigating these waters is not easy. After our experience with the Boeing/McDonnell-Douglas merger -- where U.S. and European Commission authorities reached sharply differing conclusions regarding the merger -- we redoubled our efforts to minimize that kind of conflict, if not eliminate it altogether. I believe that our more recent experience in reviewing the MCI/WorldCom merger, in which we and the EC shared our independent analyses of the transaction as they evolved, and ultimately reached essentially the same conclusions, is a good model for how close consultation in international merger enforcement can and should work. **Positive Comity**

The increase in antitrust enforcement by other nations also presents opportunities for American enforcers. Because of legal and practical constraints that may come into play, effective enforcement in the global economy may require action by more than one country's antitrust authority.

A crucial step in these matters is negotiating and implementing "positive comity" agreements with other antitrust authorities. Under such agreements, the antitrust authority of one country makes a preliminary determination that there are reasonable grounds for an antitrust investigation, typically in a case in which a corporation based in that country appears to have been denied access to the markets of another country. It then refers the matter, along with the preliminary analysis, to the antitrust authority whose home markets are most directly affected by the matter under investigation. After consultation with the foreign antitrust authority, and depending on what conclusions the foreign authority reaches and what action it takes, the referring antitrust authority can accept the foreign authority's conclusions, seek to modify them, or pursue its own action.

Such an approach has many helpful aspects. First, competition authorities have a great stake in taking each other's referrals seriously, not only in the interest of promoting cooperative relations, but because their own consumers are affected. Second, such a process maximizes the likelihood that the kind of evidence necessary to properly decide such cases can be obtained, as the antitrust authority in whose country the conduct takes place generally has greater leverage to obtain it. Finally, this process can defuse trade tensions by providing a sensible, systematic approach to fact-gathering, reporting, and bilateral consultation among competition authorities.

We currently have agreements in place with the European Communities and Canada providing for positive comity. In June, we signed an enhanced agreement with the European Communities that provides additional details and outlines a formal protocol for referrals. We hope to reach agreements with other competition authorities as well.

We now have a positive comity request pending with the European Commission regarding possible anticompetitive conduct by several European airlines that may be preventing U.S.-based computer reservation systems from competing effectively in certain European countries. In January 1997, we requested that the EC investigate the matter, and we have been in regular contact with the EC to monitor their progress. They are quite far along in their investigation, and are re-contacting several of the parties involved to obtain additional and follow-up information before reaching a final decision regarding whether to take enforcement action. We will be taking a close look at their supporting analysis for whatever decision they do reach.

Conclusion

Opening markets around the world to competition will require a sustained effort on the part of antitrust enforcement authorities. We are committed to that effort, and appreciate the support of this Subcommittee. We look forward to meeting the ongoing challenge to ensure that businesses can compete on a level playing field and that consumers around the world are benefited by competition that produces low prices, high quality, and innovative goods and services.